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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 1000

GLENDY B. ARNOLD, JUDGE OF THE PROBATE COURT OF THE CITY OF ST. LOUIS, MISSOURI,

Petitioner,

vs.

CHARLES WYERS.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI AND BRIEF IN SUPPORT THEREOF.

JULIUS T. MUENCH,
NORMAN BRENNAN,
Counsel for Petitioners.

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CHARLES WYERS.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

To the Honorable Supreme Court of the United States:

The petition of Glendy B. Arnold, Judge of the Probate Court of the City of St. Louis, respectfully prays that a writ of certiorari issue to review the decision of the Supreme Court of the State of Missouri in cause styled *Charles Wyers, Appellant,* v. *Glendy B. Arnold, Judge of the Probate Court of the City of St. Louis, Missouri, Respondent,* which reversed a judgment of the Circuit Court of the City of St. Louis, Missouri.

Statement of the Case.

The statement of this case is provided by the statement of fact in the opinion of the Supreme Court of Missouri, herein sought to be reviewed:

"The question arises in this way. In the early part of 1931 Dr. Carl Orth of St. Louis died intestate. One of Dr. Orth's heirs was his sister, Babette Orth, who resided in Germany (R. 22). On October 22, 1931, and before receiving distribution from Dr. Orth's estate, Babette Orth died R. 25, 30). It is her estate here which is involved in this case. On November 23, 1931 the probate court for the City of St. Louis appointed George Wyers, a nephew, the administrator of her estate (R. 24, 25, 46). In due course the estate of Dr. Orth was closed and the share of Babette Orth, amounting to some $40,000, was paid to her administrator who now holds her estate (R. 22, 26). On April 25, 1935, more than three years after this administration was begun, a copy of the will of Babette Orth, executed in Germany, was presented to the St. Louis Probate Court with a petition stating that the will was valid under the laws of Germany where it was admitted to probate and was in force and effect. The petition further prayed that the entire estate here be turned over to the persons named in the will, three nephews named Kachel, all residing in Germany, as Babette Orth's sole legatees (R. 23, 31, 33, 35, 37). On January 28, 1936, more than four years after the administration was commenced, a properly authenticated copy of Babette Orth's will together with its proof in Germany was admitted to probate by respondent probate judge (R. 39, 41, 48, 49, 51, 54, 66, 68, 69, 72, 73).

"Thereupon plaintiff, a nephew and heir at law of Babette Orth, but cut out by this will, applied to the St. Louis Circuit Court for a writ of prohibition against the probate judge to prevent him from proceeding under the will, and dis-

tributing the estate according to its terms on the ground the probate court had no authority to admit such will to probate because of Section 532, R. S. 1939, Mo. St. Ann., Sec. 531, p. 324, which bars the probate of a will after the lapse of one year from the date of the first publication of the notice of the granting of letters testamentary on the estate of the testator (R. 2-10). The respondent set out in his return that the will was valid under the laws of Germany and consequently was valid for the purpose of passing title to any personalty of the testatrix located in this country; that by the terms of the will the nephews Kachel were entitled to her estate; and that he was bound by the Treaty with Germany to admit the will to probate and was therefore acting within his jurisdiction (R. 11-17). The circuit court denied the application for the writ (R. 58) and plaintiff has appealed (R. 60, 61). No contention has been made about the statute being inapplicable except for the Treaty."

The Missouri Supreme Court, on appeal, reversed the lower court and ordered that the writ of prohibition sought be made absolute (R. 75).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 237 of the Judicial Code as amended by the Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 937, 28 U. S. C. A. 344 (b).

Statute and Treaty Involved.

The statute of the State of Missouri involved in this case is Section 532, Revised Statutes of Missouri, 1939 (Section 531 R. S., 1929), and is as follows:

> "When any will is exhibited to be proven, the court, or judge, or clerk thereof in vacation, may immediately receive the proof and grant a certificate of probate, or, if such will be rejected, grant a certificate of rejection:

> *Provided, however,* no proof shall be taken of any will nor any certificate of probate thereof issued, unless such will shall have been presented to a probate court, or judge or clerk thereof in vacation, within one year from the date of the first publication of the notice of granting letters testamentary or of administration that may have been granted by any probate court in the state of Missouri, on the estate of the testator or named in such will so presented (R. S. 1929—531)."

The treaty involved is that between the United States and Germany, concluded on August 4, 1925, 44 Stat. Vol. 3, page 2132; the particular provision concerned (page 2135) is as follows:

> "Nationals of either High Contracting Party may have full power to dispose of their personal property of every kind within the territories of the other, by testament, donation, or otherwise, and their heirs, legatees and donees, of whatsoever nationality, whether resident or non-resident, shall succeed to such personal property, and may take possession thereof, either by themselves or by others acting for them, and retain or dispose of the same at their pleasure, subject to the payment of such duties or charges only as the nationals of the High Contracting Party within whose territory such property may be or belong shall be liable to pay in like cases."

Judgment and Application for Certiorari.

The judgment of the Supreme Court of Missouri was entered on February 14, 1941, and this petition for certiorari was filed April 29, 1941.

Grounds Alleged On Which Question Involved Is Substantial.

1. The question has never been specifically presented to this Court heretofore, nor expressly considered in the appellate courts of any other State. The question, as may be

recognized from the memorandum opinion, may be variously argued, and the correctness of the solution of the lower court remains highly debatable.

2. The question is representative of many that may arise under all our commercial treaties, and, consequently, is of considerable importance. Its solution is applicable to virtually every commercial treaty commonly entered into with foreign countries, as the particular provision interpreted is, in substance, part of every such treaty. The interpretation of the treaty, being naturally one of public interest, should be settled by this Court and not left to the individual State courts, and this is true particularly in this case, in which the paramount effect of the treaty is denied.

3. The treaty, by such decision as that of the Missouri Supreme Court, is left open to varying interpretations in the different States, according to the different statutes thereof. Without a decision from this Court, it consequently cannot receive uniform operation and interpretation in accordance with the rule of *Weiss* v. *Wiener,* 279 U. S. 333, and *Calhoun Co.* v. *Ajax Co.,* 182 U. S. 499, as stated in *Eagan* v. *Commissioner,* 43 F. (2d) 881.

4. Substantial rights guaranteed by the treaty to individuals interested in the outcome of the case have apparently been denied by the decision.

Federal Question Raised.

The Federal question in this case was first raised in the St. Louis Probate Court in the proceedings against which the writ of prohibition is directed, when claimants under the Orth will asserted the right to ancillary probate, even in opposition to Sec. 532 R. S. Mo., 1939, by virtue of the treaty with Germany (R. 31, 42). It became the chief issue joined in the St. Louis Circuit Court by the application for writ of prohibition (R. 2) and the return to the order to

show cause (R. 11), and reply thereto (R. 17); it was the chief question presented to the Supreme Court of the State of Missouri, and the only one considered by it (R. 76). The question is stated in the court's opinion, reported in 147 S. W. (2d) 644, as follows:

> "The ultimate question for decision is whether the Treaty between the United States and Germany, although containing no express provision on the point, is to be construed as superseding the statute of this State, which limits the time within which a will may be admitted to probate."

The complete opinion is found on page 13 of the appendix to this petition. The petitioner's written memorandum opinion filed with his ruling in the St. Louis Probate Court is found on page 20 of the appendix.

Decision of Lower Court.

The Supreme Court of Missouri decided in its opinion that the treaty in question contemplated submission to the local laws of procedure, and that the statute of Missouri limiting the time for the probate of a will does not conflict with the treaty with Germany, and is not superseded by the treaty. Applying the decision to the facts of the case, it held that the will here involved, though admitted to probate in Germany, cannot be admitted to ancillary probate in the State of Missouri after the limitation period prescribed by the Missouri statute. The question thus presented and decided is the kind of question contemplated by section 237 of the Judicial Code, which confers jurisdiction on this Court in cases "where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution or any treaty of the United States." The case is of the same type as *Burthe* v. *Denis,* 133 U. S. 514; *Jordan* v. *Tashiro,* 278 U. S. 123; and *Todok* v. *Union Bank,*

281 U. S. 449, in which this Court exercised jurisdiction, and is, in form, similar to the cases reviewed in *Bandini Co.* v. *Superior Court,* 284 U. S. 8, and *Michigan Central* v. *Mix,* 278 U. S. 492.

The Question Presented.

Whether the treaty between the United States and Germany, granting the nationals of each of the contracting parties full power to dispose of their personalty within the territory of the other, will supersede the statute of Missouri limiting the time in which a will may be admitted to probate.

The question may be more particularly stated with reference to the facts of the case, in this manner:

Whether the will of a resident of Germany, duly admitted to probate in Germany, but affecting personalty of the decedent in the State of Missouri, may, by virtue of the existing treaty between the United States and Germany, be admitted to ancillary probate in the State of Missouri after, and notwithstanding, the limitation period of one year, prescribed by Section 532, Revised Statutes of Missouri, 1939 (531 R. S. 1929) has expired.

Reasons for Allowance of Writ.

The Supreme Court of Missouri has decided a Federal question of substance not heretofore determined by this Court, and in a manner probably not in accord with applicable decisions of this Court.

The memorandum brief following presents applicant's views of the law applicable to the situation.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari, issued under the seal of this Court, directed to the Supreme Court of the State of Missouri, commanding said court to certify and send to this Court for its review, a complete transcript of the record and all of its pro-

ceedings in cause No. 37,173, Charles Wyers, Appellant, *vs.* Glendy B. Arnold, Judge of the Probate Court of the City of St. Louis, Missouri, Respondent, and that the judgment of said Supreme Court of the State of Missouri may be reversed.

JULIUS T. MUENCH and
NORMAN BEGEMAN,
Counsel for Petitioner.

STATE OF MISSOURI,
City of St. Louis, ss:

Julius T. Muench, being duly sworn upon his oath, states that he is one of the counselors for the petitioner herein, and that he knows of the above proceedings, and that the facts herein stated are true.

JULIUS T. MUENCH.

Subscribed and sworn to before me this 18th day of April, 1941.

My term expires August 22, 1943.

NORMAN BEGEMAN,
Notary Public.